



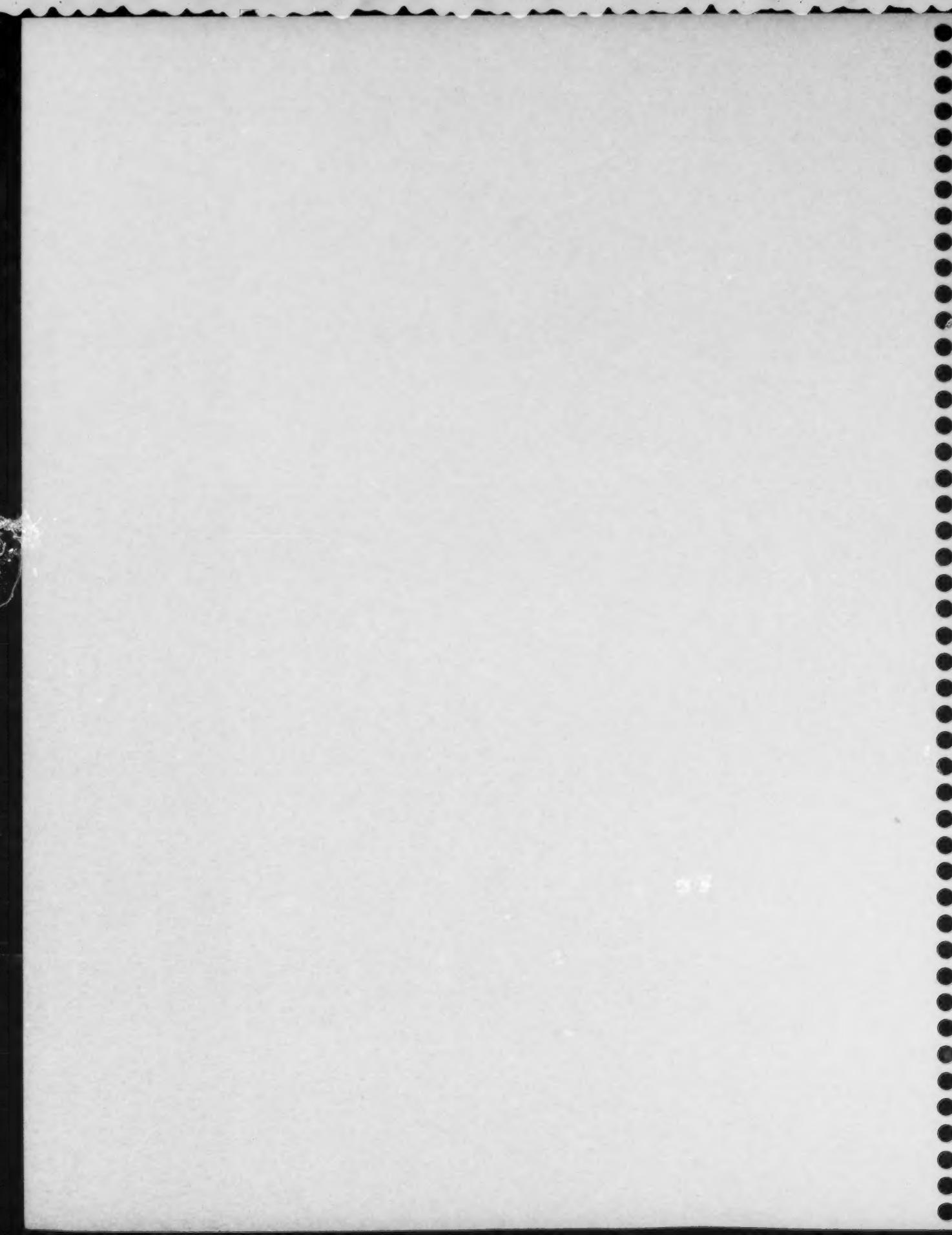
Ministry of  
Justice and  
Attorney General

# **Unrepresented Litigants Access to Justice Committee**

## **Final Report**

November 2007

**Saskatchewan**



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## **I. EXECUTIVE SUMMARY**

The Access to Justice for Unrepresented Litigants Committee (the Committee) was one of three committees established in response to a meeting of representatives of the Provincial Court and the Department of Justice in 2006. Concerns were expressed at that meeting about the increasing number of unrepresented litigants within the justice system. It was agreed that further work needed to occur to gain a better understanding of this trend and to develop appropriate responses.

The Committee held its first meeting on March 13, 2007. Three subcommittees were established at that time to review and make recommendations on the following topic areas:

- Enhancements to Publicly Funded Programs (Publicly Funded Programs);
- Changes within the Legal Community (The Legal Profession);
- Changes in the Legal Process (The Legal Process).

### **Publicly Funded Programs**

This subcommittee focused on possible reforms in two main areas:

- full legal representation services provided by Legal Aid and through court appointed counsel;
- services that would involve less than full representation such as summary advice, improved information and self-help materials.

The subcommittee recognized that a wider range of legal aid services would be beneficial, but concluded that Legal Aid would need to remain focused on criminal and family matters. The recommendations attempt to address eligibility guidelines including a recognition that different thresholds may be necessary for complex cases as a means of reducing the number of court appointed counsel cases.

The subcommittee also discussed the benefits of having Legal Aid take a greater role in the court appointed counsel cases for both youth and adult although it was acknowledged that additional budget resources would need to be provided.

The subcommittee considered a range of options related to providing information and summary advice services including the concept of toll free telephone lines, material on the internet, and how best to utilize the expertise of Public Legal Education Association, and the network of Legal Aid office across the province.

Recommendations focus on changes to Legal Aid's eligibility rules, the possibility of an expansion of the Legal Aid Commission's range of services, the enhancement of mediation and support services, and the expansion of information, self-help kits, referrals and practical assistance to self-represented individuals.

## **The Legal Profession**

This subcommittee discussed steps that could be taken to provide support to unrepresented litigants and to minimize the number of unrepresented litigants in the justice system. The subcommittee identified three areas of focus:

- developing a Pro Bono Culture;
- strengthening the lawyer-client relationship (avoiding dissolution);
- unbundling of legal services.

It was agreed that *pro bono* work is one way to increase access to counsel for litigants who cannot afford private counsel and do not qualify for legal aid or court appointed counsel. Recommendations in this area focus on encouraging a culture of *pro bono* work and establishing an effective delivery mechanism for *pro bono* services.

The subcommittee identified a range of issues that may contribute to the deterioration of the lawyer-client relationship including lack of proportionality, lack of transparency in regard to fees and the lack of forthright communication with clients regarding the litigation process. Recommendations in this areas focus on increasing education for lawyers regarding their ethical obligations to discuss fees, the necessity to act as officers of the court, and avoiding unnecessary or unproductive court applications.

An additional strategy to assist clients more easily afford legal counsel and avoid becoming wholly unrepresented is to consider unbundling of legal services. A number of barriers were identified that discourage unbundling of services including insurance, being counsel of record, and the professional duty to clients to fully investigate and become informed about the client's legal situation. Recommendations in this area focus on removing these barriers.

## **The Legal Process**

This subcommittee considered changes in legal process, and best practices in the courtroom in relation to family, civil non-family and criminal cases. The subcommittee recognized the wide discrepancy in education levels, literacy levels and the varying levels of ability to articulate among self-represented litigants.

The subcommittee focused on recommendations that improve information at the front-end of the court process and provide assistance to parties early in the process. This would include the establishment of an administrative model for variation of child support payments, and increasing the use of mediation with respect to parenting issues.

The subcommittee also made recommendations regarding increased use of case management, changes to the simplified procedure rules including compulsory pre-trail settlement conferences and the development of proportionality criteria for civil non-family cases.

The subcommittee also recommended the development of uniform remarks that a judge would be authorized to use as a means of appropriately advising unrepresented parties at various stages in the proceeding.

## **II. INTRODUCTION**

On January 13, 2006, representatives of the Department of Justice and the Provincial Court of Saskatchewan met to discuss access to justice issues in response to concerns expressed by various partners in the justice system. This was followed by two meetings which included representation from the Court of Queen's Bench, Provincial Court and Saskatchewan Justice to prepare a list of issues, gain a greater understanding of these issues and develop approaches to address them.

Three committees were created to examine various access issues: Northern/Rural; Family/Youth; and Self-Represented Litigants. Membership of each committee included judges of the Provincial Court, justices of the Court of Queen's Bench, representatives of the Department of Justice, the Law Society of Saskatchewan, the Canadian Bar Association, the Saskatchewan Legal Aid Commission, and other interested partners.

The Access to Justice for Unrepresented Litigants committee held its first meeting on March 13, 2007. At this meeting the members identified a wide range of challenges and suggestions which were ultimately themed into three categories:

- Enhancements to Publicly Funded Programs (Publicly Funded Programs);
- Changes within the Legal Community (The Legal Profession);
- Changes in the Legal Process (The Legal Process).

It should be noted that this Committee was mindful of the other two Committees, Northern/Rural and Family/Youth. There was a recognition that some of its recommendations would be similar to those of other committees. Ultimately, all the recommendations will need to be considered in their totality. The following is an overview of the discussions that occurred and the work of the committee.

### **III. SUMMARY OF RECOMMENDATIONS**

#### **A. PUBLICLY FUNDED PROGRAMS**

##### **Recommendation 1.1:**

**The financial eligibility rules for the Saskatchewan Legal Aid Commission be reviewed every three years, beginning in 2008, with a view to being updated periodically to better reflect increases in the cost of living and the need for legal aid services. It is recognized that implementation of any changes to the financial eligibility rules may require consideration of additional budget resources for the Commission through the Government's annual budget process.**

##### **Recommendation 1.2:**

**The delivery of legal representation currently provided through the court appointed counsel program administered by Saskatchewan Justice and the Legal Aid plan be rationalized to make the most effective and efficient use of existing budgetary resources, as follows:**

- (a) **implement changes to the Legal Aid Commission's eligibility rules that would see youth for whom court appointed counsel would otherwise be ordered pursuant to section 25 of *The Youth Criminal Justice Act*, eligible for legal aid, thereby eliminating the need for a court appointed counsel application in most cases;**
- (b) **consider whether the Legal Aid Commission's financial eligibility rules should be revised to establish different financial eligibility thresholds for complex adult cases to better reflect the applicant's ability to pay for the needed legal services, and the fact that without such a change, there would be legal entitlements to court appointed counsel; and**
- (c) **explore the feasibility of a service agreement between Saskatchewan Justice and the Legal Aid Commission pursuant to which the Commission would provide legal representation services in remaining court appointed counsel cases.**

**It is recognized that funding would need to be transferred from the court appointed counsel program to the Legal Aid Commission to implement these changes.**

**Recommendation 1.3:**

**Saskatchewan Justice, the Legal Aid Commission and Public Legal Education Association, in conjunction with stakeholders, undertake an analysis of how publicly funded programs and PLEA can best assist self-represented litigants in family and civil non-family proceedings, by providing (a) information, self-help kits, referrals and practical assistance that does not constitute legal advice; and (b) legal services such as summary legal advice and duty counsel that involve less than full representation. The analysis would include how best to provide the assistance to self-represented litigants outlined in Recommendations 3.1(a) and 3.5 below; and an examination of the costs and resource implications involved in providing such services and the appropriate role for each agency. The analysis would include consideration of an expansion of the Legal Aid Commission's services to provide legal services such as summary advice as part of its core mandate.**

**Recommendation 1.4:**

**Saskatchewan Justice work with the courts to enhance mediation and family support services to self-represented litigants in family matters as outlined in Recommendations 3.1(c) and 3.2.**

**Recommendation 1.5:**

**Saskatchewan Justice and the Legal Aid Commission consider an expansion of the Commission's range of service to include matrimonial property law, in cases where the Commission is already representing a low income client in a family law matter and the value of the matrimonial property is small.**

**Recommendation 1.6:**

**Saskatchewan Legal Aid Commission and the Aboriginal Courtworker Program Advisory Board meet annually to review areas where they can best work together to provide streamlined and effective services, recognizing that not all persons will be eligible for legal representation. Areas of review would include the option of courtworkers determining eligibility for legal aid on behalf of the Commission at the front end of the court process to speed up the determination of eligibility and, where the applicant is not eligible for legal representation, referral to other available services at an early stage.**

## B. THE LEGAL PROFESSION

### **Recommendation 2.1:**

**The legal profession enhance its contribution to *pro bono* work and an implementation committee be established to explore the most effective delivery of increased *pro bono* participation. In particular, attention should be given to:**

- (a) funding models for an umbrella *pro bono* organization;
- (b) an approval process for *pro bono* work qualifying for insurance coverage;
- (c) development and maintenance of a *pro bono* website;
- (d) lawyer and law firm recruitment; and
- (e) the use of needy persons certificates.

### **Recommendation 2.2:**

**The Law Society take a pro-active approach to assist its members in building and maintaining positive relationships with clients, including an enhanced focus by the Saskatchewan Legal Education Society Inc. on education regarding ethical obligations in the bar admission course. Strengthening the lawyer-client relationship can be facilitated by increased education for articling students and lawyers regarding their ethical obligations to discuss fees with clients upfront; ensure they are acting as officers of the court; and avoid unnecessary or unproductive court applications. It is recognized that the breakdown of the lawyer-client relationship resulting from a failure to meet any of these ethical obligations is properly left for the Discipline Committee of the Law Society of Saskatchewan.**

### **Recommendation 2.3:**

**The Law Society of Saskatchewan review the Code of Professional Conduct to develop guidelines to clarify the conditions under which lawyers can provide limited or unbundled legal services. In particular, consideration should be given to:**

- (a) the adoption of rules which specify procedures lawyers must follow to properly document their role when representing a client on a limited basis; and
- (b) the adoption of procedures by which lawyers will disclose that they have assisted a client by preparing or reviewing documents on a limited basis.

## **C. THE LEGAL PROCESS/BEST PRACTICES IN THE COURTROOM**

### **Recommendation 3.1:**

**An enhanced case management approach be implemented for cases involving self-represented persons in family matters, with diversion to case management occurring at an early stage in the proceedings. To support this approach, the following changes and services be made available to self-represented persons in family matters:**

- (a) assistance to comply with disclosure requirements to avoid repeated appearances and the associated costs;**
- (b) consideration of a rule that specifies income will be inputted pursuant to section 19 of the Child Support Guidelines if proper financial information has not been forthcoming; and**
- (c) enhanced use of mediation and family support services prior to the present pre-trial settlement conference stage.**

### **Recommendation 3.2:**

**Enhanced use of mediation and family support services to deal with parenting issues that arise following the making of an interim primary residence order, a final order dealing with custody and access, a voluntary settlement agreement, or an agreement arrived at a pre-trial settlement conference, to reduce litigation once a legal agreement or order is in place.**

### **Recommendation 3.3:**

**The Province consider implementing an administrative model to deal with applications to vary child support payments to reduce the cost for parties. It is recognized that a court appearance should only be required if there are legal issues over and above the parties' income levels.**

### **Recommendation 3.4:**

**Proportionality criteria be developed for civil non-family litigation, including limits on the amount of oral discovery available and requiring justification for any extended discovery, in order to reduce the cost of proceedings.**

**Recommendation 3.5:**

**Improved information and assistance for self-represented persons be provided at the front-end of the court process, including information on whether or not a lawsuit should be commenced; what is involved once a lawsuit is commenced, and requirements at various stages of the proceedings, in addition to the materials presently available on how to run a trial or a Chambers matter.**

**Recommendation 3.6:**

**The Court of Queen's Bench implement changes for hearing simplified procedure matters to better address the needs of self-represented persons, as follows:**

- (a) **change the existing simplified procedure to allow the court on its own motion to order an oral hearing as opposed to the affidavit procedure presently in place, recognizing that most self-represented persons cannot adequately prepare the necessary affidavit material;**
- (b) **change the existing simplified procedure to make a pre-trial settlement conference compulsory; and**
- (c) **review the small claims procedure in Provincial Court as a good model for the resolution of claims involving self-represented persons, including the question of whether there should be a less formal model for hearing simplified procedure matters and permitting a more inquisitorial role for the trial judge.**

**Recommendation 3.7:**

**The Province continue to increase the monetary limit in Small Claims Court in \$5,000 increments as recommended by the Ministerial Small Claims Review Committee, with an increase from \$15,000 to \$20,000 as the next stage, and to \$25,000 by January 1, 2009. A further review should occur once the \$25,000 limit has been in place for two years.**

**Recommendation 3.8:**

**In criminal cases, the judiciary develop the wording of uniform remarks that a judge is authorized to deliver to an accused person acting for himself or herself at various stages of the proceedings. Every effort should be made to eliminate self-represented persons in criminal proceedings.**

## IV. THE COMMITTEE'S WORK

### A. PUBLICLY FUNDED PROGRAMS

#### **Recommendation 1.1:**

Legal aid is provided by The Saskatchewan Legal Commission if a person is supported by social assistance, if the person's financial resources are not above social assistance levels, or where the cost of the legal services from private lawyers would reduce the person's financial resources to social assistance levels.

The financial eligibility guidelines are based on those formerly used by Saskatchewan Social Services Family Income Program to determine income supplements. The most recent amendment to these income guidelines occurred in 1999.

Given the financial eligibility guidelines have not changed for a significant period of time and given that the current guidelines are based on Saskatchewan Social Services Family Income program that has subsequently been eliminated, the committee recommends that a procedure be implemented to have regular reviews of the eligibility rules to better reflect the cost of living and the need for legal services.

#### **Recommendation**

**The financial eligibility rules for the Saskatchewan Legal Aid Commission be reviewed every three years, beginning in 2008, with a view to being updated periodically to better reflect increases in the cost of living and the need for legal aid services. It is recognized that implementation of any changes to the financial eligibility rules may require consideration of additional budget resources for the Commission through the Government's annual budget process.**

#### **Recommendation 1.2:**

- a) In 2003, *The Young Offenders Act* was replaced by *The Youth Criminal Justice Act*. Section 25 of *The Youth Criminal Justice Act* has been used extensively by the courts to appoint counsel for youth when legal aid is not available. The total number of court appointed counsel files for youths has risen from under 100 cases in 1993/94 to 736 cases in 2006/07. While the number of youth court appointed counsel cases has increased, there has been a corresponding decrease in the number of legal aid youth cases.

Legal aid eligibility rules place restrictions on a youth's right to legal services based on a financial test for the youth and the youth's parents, as well as a

determination of whether incarceration is a likely outcome. However, state funded counsel for youths in criminal matters is statutorily required. Legal aid has the expertise and resources in place to provide legal services for youths in criminal matters. It makes operational and economic sense that these services be provided through the legal aid plan. It would also result in consistent and ongoing access to legal services for youths facing criminal charges.

An amendment to the *Legal Aid Regulations* could make all youths who would otherwise be eligible for court appointed counsel under *The Youth Criminal Justice Act* eligible for legal aid. This would eliminate the need for court appointed counsel for youths in most cases.

- b) Court appointed counsel orders are often made because this is the option of last resort following denial of legal aid services. One problematic area is that of the larger and more complex cases. In the last 20 years there has been significant change in the advancement of Charter issues, the type and nature of Crown disclosure, increased police resources and abilities to pursue larger cases such as gang related or drug cases, police use of electronics in investigations, increased volume of laying multi-count Informations, dangerous offender applications, and access to justice and fair trial concerns and issues.

As the legal aid structure and financial eligibility rules for complex cases remain unchanged, these large and complex cases are increasingly being diverted from legal aid to become court appointed counsel matters. A revision of legal aid's financial eligibility thresholds for complex cases would better reflect the accused's ability to pay for needed legal service. Legal aid has the ability to provide experienced counsel to handle larger cases such as murder, complex fraud cases or to deal with clients with serious mental illness facing significant criminal charges. A change in the financial eligibility rules would result in more applicants with complex matters being eligible for needed legal aid services.

- c) Even with implementation of the changes noted above, there will always be some court appointed counsel cases. Currently the Court Services Branch of Saskatchewan Justice administers these cases. In no other jurisdiction in Canada does Court Services, or its equivalent, administer these files. In many provinces, there is a Memorandum of Understanding or an agreement in place which effectively requires the legal aid plan to provide services for court appointed counsel matters, with a transfer of funds to accommodate this function.

A Service Agreement between the Legal Aid Commission and Saskatchewan Justice could follow this format and allow legal aid to effectively and efficiently provide legal services for court appointed counsel cases, either by in-house staff or by farm outs to private lawyers. Allowing legal aid to administer these files would result in consistent and effective management of legal services and potentially add to resources to provide strengthened access to legal services in other areas within legal aid's mandate.

### **Recommendation**

**The delivery of legal representation currently provided through the court appointed counsel program administered by Saskatchewan Justice and the Legal Aid plan be rationalized to make the most effective and efficient use of existing budgetary resources, as follows:**

- (a) **implement changes to the Legal Aid Commission's eligibility rules that would see youth for whom court appointed counsel would otherwise be ordered pursuant to section 25 of the *Youth Criminal Justice Act*, eligible for legal aid, thereby eliminating the need for a court appointed counsel application in most cases;**
- (b) **consider whether the Legal Aid Commission's financial eligibility rules should be revised to establish different financial eligibility thresholds for complex adult cases to better reflect the applicant's ability to pay for the needed legal services, and the fact that without such a change, there would be legal entitlements to court appointed counsel; and**
- (d) **explore the feasibility of a service agreement between Saskatchewan Justice and the Legal Aid Commission pursuant to which the Commission would provide legal representation services in remaining court appointed counsel cases.**

**It is recognized that funding would need to be transferred from the court appointed counsel program to the Legal Aid Commission to implement these changes.**

### **Recommendation 1.3: Self-represented Litigants**

The committee recognizes that the challenge in all cases is the most effective use of available resources. Not all circumstances in which individuals find themselves faced with legal issues require a full range of service from a lawyer. Indeed there are instances where the individual in question is capable, and often willing, to deal with the matter him or herself, if only there was a straightforward way to do it.

As the analysis of unrepresented litigants received by the committee shows, too often such litigants move in directions which are inappropriate or fail to recognize the legal and other options available to them. Without guidance, there is potential for actions (and non-actions) which harm their own interest, waste the time of courts, officials and other litigants and leave a lingering distrust in the legal system.

The committee is of the opinion that easily accessible and understandable information about a potential litigant's options, rights and responsibilities, provided at the very beginning of the process, can assist in reducing the harm. Such information may

encourage a different approach. Most people who are satisfied at an early stage that their position is legally untenable will not pursue it. Some will, but even in those cases, helpful information on procedure may reduce the cost.

Those whose cases should proceed can benefit even more from guidance as to how the system works, particularly in simplified procedure matters and concerning the general requirements for disclosure of relevant information and discovery.

Saskatchewan Justice, the Saskatchewan Legal Aid Commission and PLEA are positioned to analyze the kind of information needed as well as the best way to impart that information. In some cases, self-help kits would be most appropriate. In others, referral to family counseling, consumer protection agencies, or life skills training may be of more assistance.

There are several ways to deliver information: some passive, some interactive. The latter would involve the ongoing participation of legal and other professionals, and the former would essentially be a package.

#### **Recommendation**

**Saskatchewan Justice, the Legal Aid Commission and Public Legal Education Association, in conjunction with stakeholders, undertake an analysis of how publicly funded programs and PLEA can best assist self-represented litigants in family and civil non-proceedings, by providing (a) information, self help-kits, referrals and practical assistance that does not constitute legal advice; and (b) legal services such as summary legal advice and duty counsel that involve less than full representation. The analysis would include how best to provide the assistance to self-represented litigants outlined in Recommendations 3.1(a) and 3.5 below; and an examination of the costs and resource implications involved in providing such services and the appropriate role for each agency. The analysis would include consideration of an expansion of the Legal Aid Commission's services to provide legal services such as summary advice as part of its core mandate.**

#### **Recommendation 1.4: Mediation**

When considering the needs of self represented litigants entering the court process it was felt that parties were seeking:

- General information about court processes and the law;
- Information on available community resources;
- Legal advice about their particular situation and;
- Assistance in resolving issues in dispute.

The committee concluded that steps to integrate information services and link support services would be beneficial. Streamlining services so that parties could move relatively easily from receiving general information, to specific programs or services (parent

education sessions, mediation, assistance in completion of an application for the variation of child support, referrals to legal advice or other professional services) with the objective of helping parties make informed decisions about processes, would ultimately help them move to resolution. The committee also believes it is important to have a stronger link between courts and mediation services which would allow the court to direct parties to appropriate mediation services at any point in the court process.

This could be further enhanced with the development of a case management process for self represented litigants coupled with a mediation process. This would allow the Court to provide specific information and direction to the parties and establish a sound framework prior to them entering a mediation process.

#### **Recommendation**

**Saskatchewan Justice works with the courts to enhance mediation and family support services to self-represented litigants in family matters as outlined in Recommendations 3.1(c) and 3.2.**

#### **Recommendation 1.5: Family Law**

The Saskatchewan Legal Aid Commission's ability to fulfill its mandate in family law is constrained by resources to provision of services only with respect to divorce, custody and access and maintenance and child support. In situations where matrimonial property is at issue, there will be assets available which can be applied to the cost of litigation and legal aid is not required.

Nevertheless, Legal Aid clients are not wealthy people. Their assets are modest. Undertaking a divorce on their behalf, but then refusing to handle the matrimonial property issues, often leaves the entire matter unresolved and causes additional problems. In some cases, the nature and value of the property in question is such that it would be easier to include distribution of this property in the overall service package. A review of the mandate of Legal Aid to consider the feasibility of handling low value matrimonial property matters in addition to the other services provided to the client is therefore seen by the committee to be appropriate.

#### **Recommendation**

**Saskatchewan Justice and the Legal Aid Commission consider an expansion of the Commission's range of service to include matrimonial property law, in cases where the Commission is already representing a low income client in a family law matter and the value of the matrimonial property is small.**

### **Recommendation 1.6: Aboriginal Courtworker Program**

The Aboriginal courtworker program has been in existence in one form or another for over 30 years. The workers provide an extremely valuable service to clients appearing before the courts and their assistance is absolutely crucial in many court points.

There has not been a formal effort to coordinate the services provided by Aboriginal courtworkers with other service providers such as Legal Aid. While individuals work well together informally to provide the services necessary as a joint effort, there is a need to review areas where Legal Aid and courtworkers can work together to provide more streamlined and effective services.

Particularly in northern and rural areas, Legal Aid staff rely on Aboriginal courtworkers to fill gaps and help with information gathering and interviewing. This kind of assistance could be formalized such that all of the interested parties, including the courts and prosecutors, are aware that Aboriginal courtworkers have a defined role to play. The formalization of that role should be refined regularly by the Saskatchewan Legal Aid Commission and the Aboriginal courtworkers and should initially include a review of whether Aboriginal courtworkers can assist with such matters as determination of Legal Aid eligibility.

#### **Recommendation**

**Saskatchewan Legal Aid Commission and the Aboriginal Courtworker Program Advisory Board meet annually to review areas where they can best work together to provide streamlined and effective services, recognizing that not all persons will be eligible for legal representation. Areas of review would include the option of courtworkers determining eligibility for legal aid on behalf of the Commission at the front end of the court process, to speed up the determination of eligibility and, where the applicant is not eligible for legal representation, referral to other available services at an early stage.**

## **B. THE LEGAL PROFESSION**

The Legal Profession Subcommittee was tasked with providing recommendations on the following topics:

1. Developing a *pro bono* culture;
2. Strengthening the lawyer-client relationship (avoiding dissolution); and
3. Unbundling legal services.

The theme underlying these topics is ways in which the legal community can contribute to minimizing the number of unrepresented litigants in the justice system.

### **Recommendation 2.1: Developing a Pro Bono Culture**

The subcommittee agreed that *pro bono* work is one way to increase access to counsel for litigants who cannot afford private counsel and do not qualify for Legal Aid or court appointed counsel. *Pro bono* assistance is restricted to those individuals who fall below a standardized income indicator to ensure that those who can afford private counsel pay for legal services.

Based on the experience of other jurisdictions, the most effective way to develop a *pro bono* culture and effectively deliver *pro bono* services is to create an umbrella organization that is tasked with:

- (i) developing and maintaining approved *pro bono* projects;
- (ii) recruiting lawyers and firms to participate in approved *pro bono* projects;
- (iii) promoting and publicizing *pro bono* work within the profession and society; and
- (iv) facilitating referral of litigants who qualify for *pro bono* assistance to the appropriate program.

This type of structure requires a funding commitment which will have to be explored more fully by the necessary stakeholders. There may be objections from the legal profession when lawyers are asked to pay for, as well as deliver, *pro bono* services.

Alternatively, if an umbrella organization is not a feasible course, enhancing *pro bono* work within the profession is still a much-needed component to any access to justice solution and should be pursued with available resources. The Law Society will need to play a key role in any *pro bono* solution.

#### **Recommendation**

**The legal profession enhance its contribution to *pro bono* work and an implementation committee be established to explore the most effective delivery of increased *pro bono* participation. In particular, attention should be given to:**

- (a) funding models for an umbrella *pro bono* organization;
- (b) an approval process for *pro bono* work qualifying for insurance coverage;
- (c) development and maintenance of a *pro bono* website;
- (d) lawyer and law firm recruitment; and
- (e) the use of needy persons certificates.

### **Recommendation 2.2: Strengthening the Lawyer-Client Relationship (Avoiding Dissolution)**

The subcommittee discussed the rising cost of legal services, the pressures on lawyers under a billable hour system, the increased complexity of laws, and the skewed view litigants have of the justice system due to television and the Internet, among other reasons, which have led to a deterioration in the lawyer-client relationship. In part, this

deterioration has led to an increased number of unrepresented litigants within the justice system. As well, it was noted there are several troubling trends within the profession leading to increased numbers of unrepresented litigants; lack of proportionality, lack of transparency regarding fees, and lack of forthright communication with clients regarding fees and the necessity of and/or advisability of court applications. It was also noted that these trends are visible within a small proportion of the practicing bar and are not a widespread source of concern.

There is an inherent conflict in the lawyer-client relationship between the lawyer's duty to the client and the lawyer's duty to the court. Lawyers are ethically bound to maintain a balance between these sometimes conflicting elements and assuring quality in this regard is a matter for the Discipline Committee of the Law Society. Similarly, abuses relating to any of the aforementioned trends are caught by professional standards and should most appropriately be dealt with by the Law Society. There is an opportunity, however, to educate lawyers about these matters and provide them with skills and strategies to maintain positive relationships with clients.

It is recognized that the Bar Admission Course is now delivered by the Canadian Centre for Professional Legal Education (CPLED) and contains content on professional responsibility. The course is jointly offered by the Law Societies of Manitoba, Alberta and Saskatchewan. Any change in course content must be approved by CPLED.

#### **Recommendation**

**The Law Society take a pro-active approach to assist its members in building and maintaining positive relationships with clients, including an enhanced focus by the Saskatchewan Legal Education Society Inc. on education regarding ethical obligations in the bar admission course. Strengthening the lawyer-client relationship can be facilitated by increased education for articling students and lawyers regarding their ethical obligations to discuss fees with clients upfront, ensure they are acting as officers of the court, and avoid unnecessary or unproductive court applications. It is recognized that the breakdown of the lawyer-client relationship resulting from a failure to meet any of these ethical obligations is properly left for the Discipline Committee of the Law Society of Saskatchewan.**

#### **Recommendations 3.3: Unbundling of Legal Services**

One strategy that has been considered is to unbundle legal services so that clients can more easily afford legal counsel and avoid becoming wholly unrepresented or, alternatively, as a *pro se* litigant, have access to a lawyer for discrete tasks. In unbundled service provision, there are a number of concerns for lawyers involving insurance, being counsel of record, and the professional duty owed to clients to fully investigate and become informed about the client's legal situation. While it is advantageous for litigants to receive legal advice, there are also risks in moving away from the traditional full service approach. These concerns have merit, but can likely be addressed by changes to the *Code of Professional Conduct* and an acknowledgment from the Benchers of the Law

Society that the provision of unbundled legal services is acceptable within certain guidelines.

**Recommendation**

**The Law Society of Saskatchewan review the Code of Professional Conduct to develop guidelines to clarify the conditions under which lawyers can provide limited or unbundled legal services. In particular, consideration should be given to:**

- a) the adoption of rules which specify procedures lawyers must follow to properly document their role when representing a client on a limited basis; and**
- b) the adoption of procedures by which lawyers will disclose that they have assisted a client by preparing or reviewing documents on a limited basis.**

**C. CHANGES IN THE LEGAL PROCESS AND BEST PRACTICES IN THE COURTROOM**

The mandate of the subcommittee is:

1. to consider changes to legal process, including rules, and amending legislation if necessary, to better accommodate self-represented persons who will appear in court despite what other changes may occur to minimize the number of such self-represented persons; and
2. to consider best practices for dealing with self-represented persons in the courtroom, which includes the type of information that should be made available to self-represented persons prior to the actual trial, information that should be made available to such persons during trial, and standardization of the information that should be provided to self-represented persons at each stage of the trial.

**Recommendations 3.1, 3.2 and 3.3:**

The subcommittee recognizes there is a wide discrepancy in education levels, literacy levels, and ability to articulate levels among self-represented persons. This is particularly true in family law proceedings and criminal law proceedings. There is a strongly based consensus on the committee that written based materials are, for many persons, of limited value. For this reason, information communicated orally should be available to such persons in addition to any written materials, or to explain written materials. The question arises how such oral information may be conveyed at various stages in the proceedings.

The committee concluded there is a need for increased case management in all cases involving self-represented persons. There is recognition that increased case management would only be useful if such persons can have assistance to comply with disclosure requirements in family law and civil law matters. For many, the disclosure requirements

are too complicated to master on their own. There is also recognition that increased use of mediation, prior to the present pre-trial settlement conference stage would be desirable. There is a large question as to whether judicial resources alone could accommodate the increased amount of mediation. The logical time for diversion to case management would be when the first Chambers motion is brought.

While it is recognized that there is a family law access to justice committee, this subcommittee concluded that the complexity of the family law rules, combined with the inflexibility of the Child Support Guidelines make family law proceedings very expensive. Anecdotally, almost no one has available the necessary full financial disclosure on the return date of the first motion, and this is so whether or not both parties have lawyers. The committee appreciates that other mechanisms are being considered to ease the burden with respect to compliance with the financial disclosure rules, but the point is made that perhaps one solution, in addition, is to have a rule that specifies income will be inputted pursuant to s. 19 of the Guidelines on the first return date if proper financial information has not been forthcoming at that point in time. The view is there has to be a mechanism that will avoid repeated Chambers appearances and the cost associated with the same simply to achieve compliance with financial disclosure. There is recognition that the current procedure to vary child support payments is too expensive. The view is that variation applications should be dealt with administratively, and only result in a court appearance if there are legal issues over and above what the parties' income levels may be.

The subcommittee is of the view that there is a need for mediation services with respect to parenting issues following the making of an interim primary residence-access order, a final order dealing with custody and access, a voluntary settlement agreement, or an agreement arrived at a pre-trial settlement conference. Parties simply cannot afford lawyers to litigate every parenting disagreement that arises once a legal agreement or order is in place.

#### **Recommendation**

**An enhanced case management approach be implemented for cases involving self-represented persons in family matters, with diversion to case management occurring at an early stage in the proceedings. To support this approach, the following changes and services be made available to self-represented persons in family matters:**

- a) assistance to comply with disclosure requirements to avoid repeated appearances and the associated costs;
- b) consideration of a rule that specifies income will be inputted pursuant to section 19 of the Child Support Guidelines if proper financial information has not been forthcoming; and
- c) enhanced use of mediation and family support services prior to the present pre-trial settlement conference stage.

#### **Recommendation**

**Enhanced use of mediation and family support services to deal with parenting issues that arise following the making of an interim primary residence order, a final order dealing with custody and access, a voluntary settlement agreement, or an agreement arrived at a pre-trial settlement conference, to reduce the litigation once a legal agreement or order is in place.**

#### **Recommendation**

**The Province consider implementing an administrative model to deal with applications to vary child support payments to reduce the cost for parties. It is recognized that a court appearance should only be required if there are legal issues over and above the parties' income levels.**

#### **Recommendations 3.4, 3.5, 3.6 and 3.7:**

With respect to civil, non-family proceedings, the problem of self-represented litigants is not as acute as it is in family law. In Chambers proceedings, the Chambers judge can usually overcome the lack of advocacy skills on the part of the self-represented person because in most cases the facts are not in dispute and it is a question of applying the law to the facts. It is in trial proceedings, where credibility issues are involved, the average self-represented person does not have the wherewithal to in the first instance present all evidence relevant to their own case, and thereafter to cross-examine the opposing party. The subcommittee considered the following:

- As noted above, increased and earlier case management in civil matters involving self-represented persons is desirable. This should be manageable within existing resources.
- Simplified procedure. The Queen's Bench Court has recently endorsed two major changes to the existing simplified procedure. These include a compulsory pre-trial settlement conference in all simplified procedure matters. In addition, an amendment to the rules which will allow the court on its own motion to order an oral hearing as opposed to the affidavit procedure presently in place. It is recognized that most self-represented persons cannot adequately prepare the necessary affidavit material. The small claims procedure in Provincial Court was reviewed and is considered a good model for resolution of claims involving self-represented persons. It may be that the Court of Queen's Bench should be considering a less formal model for a hearing for simplified procedure matters. The question is raised if such a model should allow for a more inquisitorial role by the trial judge.

- It was agreed that proportionality criteria need to be developed with respect to civil, non-family, litigation. There is a consensus that unrestricted oral discovery should be limited, as it is a main source of added cost to civil litigation proceedings. This is not only a self-represented person issue, but it is recognized that persons will become self-represented after exhausting the money available for legal fees in the discovery process. Other jurisdictions limit the amount of oral discovery available, and require justification for any extended discovery in any particular matter.
- Improved information for self-represented persons at the front end of the process would be desirable. This would involve the Queen's Bench Court emulating the Provincial Court in providing comprehensive information on whether or not a lawsuit should be commenced, what is involved once a lawsuit is commenced, and pointing out the requirements along the way. As noted above, this should include a video as well as written materials. This material would be over and above the present materials available on how to run a trial or a Chambers matter.

#### **Recommendation**

**Proportionality criteria be developed for civil non-family litigation, including limits on the amount of oral discovery available and requiring justification for any extended discovery, in order to reduce the cost of proceedings.**

#### **Recommendation**

**Improved information and assistance for self-represented persons be provided at the front-end of the court process, including information on whether or not a lawsuit should be commenced; what is involved once a lawsuit is commenced, and requirements at various stages of the proceedings, in addition to the materials presently available on how to run a trial or a Chambers matter.**

#### **Recommendation**

**The Court of Queen's Bench implement changes for hearing simplified procedure matters to better address the needs of self-represented persons as follows:**

- (a) **change the existing simplified procedure to allow the court on its own motion to order an oral hearing as opposed to the affidavit procedure presently in place, recognizing that most self-represented persons cannot adequately prepare the necessary affidavit material;**
- (b) **change the existing simplified procedure to make a pre-trial settlement conference compulsory; and**

- (c) review the small claims procedure in Provincial Court as a good model for the resolution of claims involving self-represented persons, including the question of whether there should be a less formal model for hearing simplified procedure matters and permitting a more inquisitorial role for the trial judge.

#### **Recommendation**

**The Province continue to increase the monetary limit in Small Claims Court in \$5,000 increments as recommended by the Ministerial Small Claims Review Committee, with an increase from \$15,000 to \$20,000 as the next stage, and to \$25,000 by January 1, 2009. A further review should occur once the \$25,000 limit has been in place for two years.**

#### **Recommendation 3.8:**

With respect to the criminal law, it was agreed that one of the major challenges is to prepare uniform remarks that a trial judge is authorized to advise an accused person acting for himself or herself at various stages in the proceedings. The Canadian Judicial Council has recently published material intended to provide assistance to trial judges in this respect, but it does not include the wording that should be used by trial judges. It was agreed such wording should be developed. The same should apply with respect to show cause hearings, and/or bail reviews where a person is acting on their own behalf. It was generally agreed that a person acting on their own behalf in a criminal trial is at a serious disadvantage, and given the consequences for the person, every effort should be made to eliminate self-represented persons in criminal proceedings.

#### **Recommendation**

**In criminal cases, the judiciary develop the wording of uniform remarks that a judge is authorized to deliver to an accused person acting for himself or herself at various stages of the proceedings. Every effort should be made to eliminate self-represented persons in criminal proceedings.**

**APPENDIX A**  
**LIST OF COMMITTEE MEMBERS**

Rod Crook, Chair	Assistant Deputy Minister, Saskatchewan Justice
Doug Moen, Q.C.	Deputy Minister, Saskatchewan Justice
Chief Judge G.T.G. Seniuk	Provincial Court, Regina
Chief Justice Laing	Court of Queen's Bench, Regina
Justice Robert Richards	Court of Appeal, Regina
Judge C. Snell	Provincial Court, Regina
Judge M. Irwin	Provincial Court, Saskatoon
Judge Murray Brown	Provincial Court, Regina
Don McKillop, Q.C.	Civil Law, Saskatchewan Justice
Ken Acton	Dispute Resolution Office, Saskatchewan Justice
Chris Lafontaine	Aboriginal Courtworker Program, Saskatchewan Justice
Sharon Pratchler, Q.C.	Registrar, Court of Queen's Bench and Provincial Court Saskatchewan Justice
Allan Snell, Q.C.	Saskatchewan Legal Aid Commission
Brent Cotter, Q.C.	College of Law, Saskatoon
Christina Clifford	Canadian Bar Association
Greg Walen, Q.C.	Saskatchewan Law Society
Joel Janow	Public Legal Education Association
Kyle Vermette	Law Student, College of Law
Pam Kovacs	McKercher McKercher & Whitmore
Vic Dietz, Q.C.	Olive Waller Zinkhan & Waller
Bill Johnson, Q.C.	Gerrand Rath Johnson

**Appendix B**

**A DISCUSSION PAPER ON THE ISSUE OF  
LITIGANTS WITHOUT LAWYERS IN SASKATCHEWAN**

**October 25, 2006**

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## **PART I BACKGROUND**

### **A. Problem Statement**

There is general agreement that there are increasing numbers of litigants involved in the court system who do not have legal representation. What is less clear is what is causing this situation and how it can be minimized or resolved. Part of the difficulty is the lack of empirical data on the number of unrepresented litigants in the court system. Information available is largely anecdotal or extremely limited in terms of the time frame or subject matter examined. It is generally recognized that the number of unrepresented litigants is higher in the family and criminal law areas.

However, the impact of this phenomenon is seen in all areas of the court system – from the increasing demands on the time of the court registry staff, additional costs and delays for opposing lawyers and represented clients, and the difficult positions Judges and lawyers are faced with when dealing with unrepresented individuals on files.

This discussion paper examines 3 aspects of the issue. In the first part of the paper, available data is reviewed in order to determine who are the unrepresented and in what areas of the court system they most frequently appear. The second part of the paper examines options for minimizing the scope of the issue, through measures designed to reduce the number of unrepresented individuals. The final part considers what services and mechanisms can be employed to assist unrepresented litigants in order to make the system work better, assuming that there will always be some unrepresented litigants involved in the court system.

### **B. Who are the Unrepresented**

This part summarizes the available data on unrepresented individuals and attempts to outline the key characteristics of the unrepresented individual as well as the factors that lead to them being unrepresented.

#### **1. Terminology: Unrepresented vs. Self-Represented**

At the outset, it is important to clarify the terminology used in this paper to describe those litigants appearing before the court without counsel.

A number of articles and commentators distinguish between two broad categories, described as the unrepresented and the self-represented. The difference between these two groups is that the unrepresented want to have a lawyer but can not

afford one. The self-represented can afford a lawyer but have chosen not to have one, for various reasons. For the purpose of this paper, the term "unrepresented" is used to collectively refer to any litigants who do not have a lawyer. However, some may find it useful to analyze the issue based on the distinction noted above.

## 2. Available Data

What are the numbers of unrepresented individuals involved in the court system? Why do they become involved in the court system without legal representation? Who are these people? What is their age, gender, income and education level?

A detailed review of the available statistics on unrepresented litigants in Canadian jurisdictions was undertaken by the Alberta Law Reform Institute in March of 2005.

Both formal and informal studies and data collections have been undertaken in various courts, with limited results. Prince Edward Island's *Task Force on Access to Justice* could not determine the number of self-represented litigants appearing in its courts:

It is difficult to say just how many litigants are, in fact, representing themselves but there is a clear sense from those within the court system that the number of these litigants is growing each year.

That study found that self-represented litigants have increased over 19% in a one-year period in family/divorce cases. In the Superior Court, 10.1% of all cases before the courts involve at least one self-represented litigant. Of this total, 83.4% have appeared in proceedings involving divorce/family matters (data collected between 1999-2001).

The British Columbia Justice Review Task Force, reported that a "snapshot" of two week periods in 1999-2001 showed that the number of self-represented litigants in the Supreme Court varies from 5.5% to 14.2%. In family matters the numbers were higher, ranging between 11.5% and 24.6% for the same periods. With no empirical data to compare, the numbers could not be used to show an increase in the number of self-represented litigants in the courts, although there is a "perception of those within the system that there are increasing numbers of self-represented litigants."

In a 'mini-study' conducted in daily family law chambers in the Court of Queen's Bench in Edmonton between January-March 2001, an average of 54 applications per month were filed by self-represented litigants. Of these, an average of 21 were heard, the rest being struck from the list or adjourned. These numbers do not include applications where the respondent was self-represented. Of the applications filed by self-represented litigants: 34% were for a new

application or a variation of a child or spousal support order, 29% were for an initial application for, or review of, a restraining order; 24% were to compel financial disclosure; and 5% were custody or access applications.

An oft-cited statistic regarding the increased presence of self-represented litigants in Canadian courtrooms comes from data compiled by the Ontario Superior Court. It reports that between 1995 and 1999 the number of self-represented litigants in Ontario's Unified Family Court rose by an alarming 500%. Between these dates, 1073 files were opened by individuals representing themselves. Of these files, 633 were civil cases, 415 were family cases, and 25 were criminal in nature. These statistics are modest; they only reflect files *opened* between these dates, *by* a self represented litigant. They do not include files opened previously or by a represented applicant where the respondent is unrepresented. Those numbers are much larger. For example, in the Ontario Superior Court in 1998, 16,194 cases included a self represented litigant as a party, an increase of approximately 1/3 from 1994. As of 1999, self-represented litigants outnumbered represented litigants in that Court 1.6 to 1.

Increases in the numbers of self-represented litigants are also reported in common law jurisdictions outside of Canada. For example, in the United States, data from the Administrative Office of the U.S. Courts show that between 1991 and 1993 the number of *pro se* litigants in the Court of Appeals (Federal Circuit) increased by 12-49%. Two more recent American surveys found that the rate of self-represented litigants in family matters is normally around 60% but in some cases is as high as 80%.

Some insight can be found into the issue of unrepresented litigants by examining the data collected by the British Columbia Supreme Court Self-Help Information Centre. The main reason given by users of the centre for not having a lawyer was that there were not able to afford one. Just over 75 percent of users reported this reason. Approximately 10 percent of the users of the center indicated they did not want to have a lawyer. The greatest majority of users were unrepresented rather than self-represented litigants. About 40 percent of users reported that they had a lawyer at one point but could not afford to continue with the lawyer.

People using the service of the B.C. Self-Help Information Centre had significantly higher levels of education, with more than 33 percent with a college or university degree and nearly 66 percent reporting at least some level of post-secondary education. About 75 percent had access to and ability to use a computer.

At the same time, people using the service had lower than average levels of income. More than 60 percent had a gross monthly income below \$2,000 per month. The largest block of users were between the ages of 40 and 49, with slightly more male than female

users. More than 50 percent of users spoke a language other than English at home with Asian languages being dominant. Approximately 40 percent of users were initiating rather than responding to claims.

In considering this data from the B.C. Self-Help Centre, one caveat must be acknowledged. The question of who is not using the service is not considered and it may well be that there is a group of people who do not use the self-help centre because they do not have the skills or confidence to use even a self-help centre.

A 5 year study by the Canadian Forum on Civil Justice within the civil system found that the characteristics of unrepresented individuals ranges from those with low income and literacy to a significant portion who are knowledgeable, willing to undertake research and who have chosen to represent themselves.

American research has shown reasons ranging from inability to pay legal fees to a desire to exercise a constitutional right to represent themselves. In one divorce study in the U.S., it was determined that the reasons for being unrepresented were as follows:

- 31 percent – could not afford a lawyer;
- 45 percent – thought their case was simple;
- 22 percent – could afford a lawyer but chose not to spend their money on a lawyer.

In the same study, results showed that 79 percent of those who had been represented by lawyers indicated they would choose a lawyer the next time. Similarly, approximately 72 percent of unrepresented divorce litigants said they would choose to self-represent themselves again. Only 36 percent of unrepresented respondents who faced lawyers on the other side of the file would represent themselves again.

The Alberta Law Reform Institute reviewed the available research regarding income and education levels and discovered the following results:

Regarding income levels, research conducted in 1990 by the American Bar Association (ABA) ascertained that "it is primarily younger, lower-income people without children and little, if any, real estate or property, who represent themselves." In contrast, research commissioned in 1996 by the New York State Bar showed that the number of middle-income people opting for self-representation is on the rise. Regarding education level, the 1990 ABA research suggested that most self represented litigants "have completed some college work." A quarter of the respondents in the 1996 New York State Bar research were self-represented and these litigants were "better educated and on the more highly compensated end of the middle income spectrum." Evidence in Australia points in the opposite direction. According to a 1999 Report to the Family Court of Australia, self-represented litigants are often "[p]ersons, who are more likely than the population as a whole to have limited formal education, limited income and assets and to have no paid employment."

### **C. Summary of Findings**

What general conclusions can be drawn from the available research, which at times appears to yield contradictory results or at least, varying results depending on geographic location?

First of all, it is important to bear in mind that there is not only one reason why people are unrepresented. While economic reasons clearly play a major role for many individuals, there is also a significant group of individuals who chose not to hire a lawyer, even though they can afford to do so, ranging from 10 to 30 percent, depending on the study being considered. The income and education level of these two groups may also vary.

The implication is that there may well need to be a range of responses required in order to meet the different needs of these two groups.

Secondly, the study results are not uniform across jurisdictions but vary somewhat from geographical location to location. As a result, in designing appropriate responses, it will be necessary to conduct some local studies regarding the demographics of and reasons for unrepresented individuals in Saskatchewan. Gathering statistical information from such organizations as the Law Society libraries and local pro bono groups would be of assistance in determining the user groups and their characteristics. Use of focus groups and consultation with local groups could also be of assistance.

Thirdly, although the existing statistics are somewhat limited, there is a clear indication that the presence of unrepresented individuals is high in the family law area and it may well be that a particular focus needs to be paid to the issues associated with the lack of representation in this area.

Fourthly, given the absence of statistical information about the numbers and characteristics of self-represented individuals in Saskatchewan, some base line research is needed in order to determine whether any measures that are ultimately implemented have an impact and if so, to what degree. As they do not currently exist, evaluative tools will need to be designed to measure the impact of any reforms that are contemplated.

## **PART II**

### **HOW TO MINIMIZE THE PROBLEM**

#### **A      Role of the Court: Introducing the Principle of Proportionality**

Civil justice reforms dealing with the role of the court tend to focus on adopting the principle of proportionality in designing procedures and rules to govern court actions. Proportionality is aimed at reducing the cost of litigation and improving access to justice by ensuring that the costs of litigation are proportionate to the value of the amount in dispute.

An example of such an approach can be found in Rule 68 of the British Columbia Rules of Court. Rule 68 sets out a more economical process to deal with claims under \$100,000. The full text of Rule 68 can be found in the B.C. Rules of Court, at <http://www.ag.gov.bc.ca/courts/civil>.

The principle of proportionality is expressly recognized in Rule 68 as follows:

Proportionality

68 (13) In considering any application under this rule, the court must consider what is reasonable in relation to the amount at issue in the action.

Rule 68 is designed to expedite actions by limiting interlocutory applications, minimizing examinations for discovery, limiting the evidence that the parties can call at trial and requiring parties to exchange comprehensive information at an earlier stage of the process. A greater degree of case management is exercised by the court, to ensure proceedings do not become protracted and specific authority is provided to a case management Judge to make orders respecting one or more of the following:

- (a) the issues that are in dispute and those that are not in dispute;
- (b) ways in which the issues in dispute may be resolved other than by way of trial, including, without limitation, under Rule 18A;
- (c) striking pleadings;
- (d) pleadings be amended or closed within a fixed time;
- (e) discovery, production, exchange or examination of documents or exhibits;
- (f) discovery and examination of parties, including that examinations for discovery be conducted in accordance with the terms and conditions, and within a schedule, that the court directs;
- (g) all procedures for discovery be conducted in accordance with a schedule that the court directs;

- (h) a timetable for the steps to be taken in the case before it comes to trial;
- (i) the parties attend a mini-trial, settlement conference or mediation and giving directions for the conduct of the mini-trial, settlement conference or mediation;
- (j) requiring that the evidence on any one or more issues be given by one jointly-instructed expert only;
- (k) allowing one or more of the parties to call 2 or more experts;
- (l) requiring a statement of agreed facts to be filed within a fixed time or by a specified date;
- (m) authorizing the bringing of interlocutory applications within a fixed time or by a specified date;
- (n) establishing a period within which any step in the action must be completed;
- (o) fixing one or both of the date and the length of trial;
- (p) trial preparation;
- (q) adjourning the trial;
- (r) settlement of the action or of issues;
- (s) any other matter that may assist in making the trial more efficient;
- (t) any other matters that may aid in the resolution of the proceeding.

In addition, the court is given authority under Rule 68 to order costs at a case management conference.

Trial management conferences are also provided for at which a trial judge, may, on application or on his or her own motion, make orders respecting one or more of the following:

- (a) a trial scheduling plan;
- (b) admissions of fact at trial;
- (c) admission of documents at trial, including
  - (i) agreements as to the purposes for which documents may be admitted, and

- (ii) the preparation of common books of documents and document agreements;
- (d) imposing time limits for the direct or cross-examination of witnesses, opening statements and final submissions;
- (e) direct evidence of witnesses be presented at trial by way of affidavit;
- (f) the parties present opening statements and final submissions in writing;
- (g) the number of days reserved for the trial be changed.

The result of these reforms is a greater predictability of the costs associated in going to trial. Rule 68 was introduced as a two-year pilot project in 2005.

Some jurisdictions have taken on more ambitious initiatives, such as Alberta's major review of their Rules of Court. The objectives of the project are as follows: maximize the clarity of the Rules; maximize the usability of the Rules; maximize the effectiveness of the rules; and maximize the Rules' advancement of justice system objectives. The general goal is to make the civil justice system more accessible and comprehensible for users by helping users identify the real issues in dispute and facilitating the quickest means of resolving a claim at the least expense.

In examining the utility of the proportionality principle in reducing cost and expediting proceedings, consideration has to be given to the scope of its potential application. Key questions to be discussed include whether the principle should be made central in interpreting rules of procedure, should apply to the pleadings stage, the presentation of evidence stage as well as inform the approach to case management.

Part 47 of the Court of Queen's Bench Rules for Saskatchewan contains provisions relating to needy persons. These provisions are designed to provide a mechanism to waive fees for litigants and provide protection from the usual cost consequences of civil action. These provisions were designed to assist lawyers performing pro bono services and pre-date the creation of a Legal Aid Commission in Saskatchewan.

Upon creation of the Commission, responsibility for issuing the certificates was passed from the Law Society Benchers to the Legal Aid Commission. A review of the role and scope of Part 47 would be timely in terms of providing support for the provision of pro bono services.

## **B. Role of the Legal Profession and the Law Society**

Three main reforms are discussed in the literature in relation to the role of the legal profession in dealing with the issue of unrepresented individuals. They are:

1. Improved information for clients regarding legal costs;
2. Alternative billing practices, including the unbundling of legal services; and
3. The enhancement of pro bono services and free legal clinics.

### **1. Improved information for clients regarding legal costs**

Unlike many other services which they might access, clients are not usually provided with detailed information regarding the costs for their legal matter at the outset nor do they receive much information as to the basis upon which fees are charged. The Law Society of Saskatchewan has issued guidelines for legal fees for residential and farmland real estate transactions which provide assistance to clients in determining whether fees are fair and reasonable. The guidelines consider the complexity, value and skill required to perform the services in question, based on information obtained from lawyers across the province.

Is sufficient time spent at the outset of a solicitor client relationship in discussing in a fair and frank manner the amount of fees which are going to be charged? If not, is there a role for the Law Society in setting out expectations for lawyers in this area and providing public education information regarding lawyers' fees?

Are there sufficient expectations set out for lawyers by the Law Society regarding their role in informing the client of the costs of their legal action and the basis upon which the fees will be charged? Is there a role for the Law Society in setting out what are fair and reasonable fees for service in other areas of the law beyond real estate transactions?

### **2. Alternative Billing Practices, Including the Unbundling of Services**

The concept of time billing appears to have been universally adopted by lawyers. This means that from the perspective of the legal profession, the time spent on a file equals value. However, from the client perspective, the focus is on what has been accomplished, or how far the ball has moved down the field. This is particularly the case in matrimonial matters, where there are limited budgets.

A number of important questions arise from this issue. To what extent are or can results or progress be factored into a lawyer's billing? Is there a role for the concept of proportionality when determining the legal fees to be charged for a particular matter? How can the concept of proportionality be brought into play so that the legal costs are proportionate to the value of the action? For example, if the client has a limited budget, what measures can be used to ensure that the

limited funds are put to the best or most effective use? What can be done to ensure that the limited budget is spent on substantive versus procedural matters? What measures should be used to determine the value of an action?

The Canadian Bar Association has done some work on the issue of developing alternatives to the billable hour, which can be found in the article "How to Develop Alternatives to the Billable Hours", by Edward Poll, on the national website, on the PracticeLink page, at [www.cba.org/CBA/PracticeLink/MF/billablehour.aspx](http://www.cba.org/CBA/PracticeLink/MF/billablehour.aspx). Some billing options described in the article include:

- **Blended Hourly Rate.** The client is charged one fee per hour regardless of who in the firm works on the matter - a senior partner with a high rate or a junior lawyer with a lower one. The right balance gives clients a better price, and firms the financial incentive to delegate work.
- **Fixed or Flat Fee.** The fee is determined and stipulated in the engagement letter, before the assignment even begins. It will not vary no matter how much time the lawyer expends or the result. Flat fees are especially useful for routine legal services, and encourage the use of technology to streamline the delivery of those services.
- **Contingent or Percentage Fee.** Frequently used in personal injury and collection matters, this fee is a percentage of the value recovered for the client. It is particularly useful for the lawyer skilled at analyzing cases and accepting those with a high likelihood of success.
- **Premium Pricing.** An hourly rate or some other billing method is used as the base, and the lawyer is able to add on an additional premium if the result exceeds client expectations. Of course, there is no premium if the outcome is not successful. Premium pricing gives the lawyer a stake in the outcome and the assurance of a minimum fee even for a "bad" result.
- **Retainer.** This method sets up a fixed fee for a fixed time cycle (often monthly) during a designated period (often one year). It is sometimes used as a one-time payment to guarantee the availability of the lawyer or firm at a future date.
- **Value Billing.** Rather than setting price by a standard unit or result, value billing lists actions taken to benefit the client, beyond the time of how that value is applied. Rapid return of phone calls, personalized service, unexpectedly good results - these are all examples of value-added actions that the lawyer can demonstrate and charge for.

What is meant by the "unbundling" of legal services? Unbundling has been defined as follows, "Unbundling, also called discrete task representation or limited services representation, is a practice where a client hires an attorney or perform only specified tasks agreed upon beforehand by both attorney and client". The concept involves a philosophical shift from the traditional full-service

approach to an "a la carte" approach. Duty counsel, who provide advice on a limited range of matters at a particular point in proceedings, can be seen as one method of unbundling legal services.

In *The Complete Guide to Mediation* (ABA Family Law Section, 1997), Forrest Mosten identified 17 classes of services which a lawyer can perform for clients:

1. general legal advice;
2. advice about ADR;
3. evaluation of the client's self-diagnosis;
4. procedural information for filing and serving documents;
5. reviews of correspondence and court documents;
6. preparation of documents;
7. factual investigation;
8. legal research;
9. discovery;
10. planning for negotiations;
11. planning for court appearances;
12. backup and troubleshooting during the trial;
13. referrals to experts;
14. advice on appeals;
15. procedural assistance with appeals;
16. preventive planning; and
17. other.

By viewing legal services in this way, an open dialogue can take place between a client and lawyer on what the person can afford and what services can be provided to fit within the client's budget.

### **3. Enhanced Pro Bono Services and Free Legal Clinics**

The history of organized pro bono efforts in the province of Saskatchewan is a relatively short one. Most involved in the legal system will agree that pro bono work occurs every day, however, as unrepresented litigants grow in number, the need to organize these efforts and make them more globally accessible also grows.

Pro bono work is often referred to as an obligation, reflecting its place as a prominent professional component of early practice for barristers and solicitors, who were members of the upper class and under the doctrine of noblesse oblige, would provide assistance to those who could not afford it.

For lawyers today, pro bono means to voluntarily contribute part of their time without charge, or at substantially reduced rates, to establish or preserve the rights of disadvantaged individuals; to provide legal services to assist organizations who

represent the interests of, or who work on behalf of, members of the community of limited means or other public interest organizations, or for the improvement of laws or the legal system.

Following dramatic cuts in the legal aid system nationally, ad hoc pro bono efforts arose in the province, the most visible of which was the Saskatoon Legal Assistance Clinic (SLAC). SLAC was affiliated with the College of Law and, with the assistance of law students, attempted to fill gaps in services provided by Legal Aid in Saskatoon. Since the mid 1980's, the College of Law has not offered a clinical law course or partnered with a community free legal clinic until just recently. Other efforts were programs developed by the Law Society of Saskatchewan, including the Lawyer Referral Service and the Senior's Legal Assistance Service.

Three weekly free legal clinics operate in the province of Saskatchewan. The Saskatoon Free Legal Clinic is the longest running clinic, having opened its doors several years ago. The most recent is in Prince Albert, having been in operation since February of 2006. The Regina clinic opened in June of 2005.

The clinics, as currently structured, are based on a low-cost operating model whereby partnerships are formed with local community groups who provide office and administrative support, which includes client intake. Volunteer lawyers donate their time on a rotating basis and provide advice and assist clients with self-representation. In order to be effective, follow-up appointments are arranged so guided self-representation is possible.

On occasion, lawyers at the clinics will provide complete pro bono representation and assistance to clients who simply cannot self-represent. While currently a small percentage of clients receive full pro bono representation, as the number of volunteer lawyers contributing time to the clinic increases, the ability for lawyers to take on such cases also increases, as the volunteer contribution is then shared by many, not simply a few.

Client intake at the clinics is based on low income cut-off indicators as provided by Statistics Canada. Low income cut-offs (LICOs) are intended to convey the income level at which a family may be in straitened circumstances because it has to spend a greater portion of its income on the basics (food, clothing and shelter) than does the average family of similar size. LICOs are generally considered a reflection of poverty.

Since their inception, all three clinics in Saskatchewan have been cognizant of the benefit that can be derived from keeping statistics and reporting. The following data is available:

**Saskatoon Free Legal Clinic**

*(for the period May 2005 to April 2006; one lawyer every week)*

Telephone inquiries: 448

Appointments: 101 (Family: 44; Civil: 45; Criminal: 17)

**Regina Free Legal Clinic**

*(for the period June 2005 to September 2006; three lawyers every week)*

Telephone inquiries: 341

Appointments: 306 (Family: 169; Civil: 98; Criminal: 39)

Statistics for the Prince Albert Legal Clinic are currently being recorded and will be tallied and available after a year of operation. Efforts to streamline administrative processes and to keep the clinic model low-cost and efficient are also underway. A database for recording clinic intake has been developed and piloted. Further such efforts are in the planning stages.

### C. Role of the Government

Historically, the Saskatchewan Legal Aid Commission provided a broad range of services and the need for widespread pro bono efforts were minimal. However, following cuts in federal funding in the 1980's and caps on funding in the 1990's, Legal Aid has not been able to provide civil legal services, other than in family law. Availability of Legal Aid in civil matters other than family law would assist in addressing the issue of unrepresented litigants.

The appointment of state-funded counsel has received greater attention in recent years, primarily in the criminal and family law area. There has been no extension of state-funded counsel into other non-family civil areas.

The role and use of duty counsel has developed in other jurisdictions beyond the current limits in Saskatchewan. Anecdotal evidence indicates that duty counsel can often settle a matter at the first appearance on family matters. For example, what the clients often lack is a familiarity with the process and interim custody/access orders can often be worked out on a first appearance when duty counsel is available. As many parties are unrepresented in family matters, the experience in other jurisdictions has been that two duty counsel are necessary, to ensure both parties have advice.

Two examples of the duty counsel system in use in Canadian jurisdictions are briefly outlined below.

Manitoba has a duty counsel in many criminal and youth courts and some child welfare courts throughout the province. Duty counsel is there to help people who must appear in court but do not have a lawyer acting for them. Anyone can use the services of the duty counsel lawyer and there is no income eligibility testing nor are applications required to be completed.

On their website, at <http://www.legalaid.mb.ca>, Manitoba Legal Aid describes their duty counsel program as follows:

In criminal, youth and Child & Family Services cases, you can get a lawyer through our full service duty counsel program. A full service duty counsel is a lawyer who goes to court and will help anyone who comes to the court and needs a lawyer. This lawyer will spend as much time as the case needs to get the facts, discuss the case with you and with the Crown Attorney or the Child & Family Services lawyer and make sure that you do not agree to anything you shouldn't. If your case has to go to trial, then you have to apply for a lawyer who will get a certificate from Legal Aid.

In 2001, Legal Aid Ontario expanded the role of duty counsel in the Unified Family Courts to assist with applications to vary support orders. The two types of duty counsel in Ontario Unified Family Courts are succinctly described on the Ontario Women's Justice Network, at <http://www.owjn.org/info/duty.htm>:

In the Unified Family Courts, which exist in much but not all of the province, there are two streams of legal aid lawyers available to assist people. The Family Law Information Centres (FLICs) provide an "advice lawyer" who offers summary legal advice to anyone who needs help with a family law matter. The duty counsel lawyer assists unrepresented people in the courtroom, once the advice lawyer has helped the person with a general introduction to the court process and to basic legal information.

In Saskatchewan, the Family Justice Services Branch of the Courts and Civil Justice Division of Saskatchewan Justice provides valuable court-annexed services to the Family Law Division. One of the services offered is the Family Law Information Centre and Support Variation Project, which is described on the Justice website as follows:

The Saskatchewan Department of Justice has responded to this need by creating the Family Law Information Centre and Support Variation Project. This project:

- assists parents with limited income who have a child support order or agreement registered in Saskatchewan and who want to vary that order or agreement;
- provides resources and information to the public in the area of child support and family law.

However, there are currently limits on the scope of the services offered. For example, the service does not provide legal advice. Consideration needs to be given to the introduction of duty counsel in family matters, whether through the Legal Aid system or through Family Justice Services. An expansion of the Support Variation Project should also be considered.

The Government of Canada prepared an extensive research study on the use of duty counsel <http://www.justice.gc.ca/en/ps/rs/rep/2003/rr03lars-4/rr03LARS-4.pdf> which reviewed the *Brydges* duty counsel system in detail, as well as touching on areas such as the use of paralegals. The possibility of extending this type of duty counsel system into other areas should be explored.

While court-annexed government services are available in Saskatchewan in the family law area through Family Justice Services, there is no equivalent on the civil, non-family law side. Additional dispute resolution methods can be examined through the Dispute Resolution Office.

As well, government can explore increased limits in small claims, to provide a cost-effective mechanism for smaller claims.

#### **D. Role of Other Actors and the Community**

The Canadian Bar Association has provided leadership and been active in the area of access to justice issues and in promoting civil justice reform initiatives. It has also launched an initiative to encourage participation by lawyers in pro bono work. A list of useful links to pro bono sites can be found on the national CBA website, at <http://www.cba.org/cba/groups/probono/>. The CBA continues to actively lobby for increased funding for legal aid. Various public education tools have been developed as a result of CBA sponsored initiatives.

The University of Saskatchewan Pro Bono Students Canada program was established in the Spring of 2000 at the College of Law. The program has continued to grow every year and now provides pro bono services to all parts of the province. The traditional mandate of this program is to encourage law students and legal professionals to volunteer in their communities and provide pro bono legal assistance to community groups and organizations.

PBSC facilitates these efforts by matching volunteer law students with non-profit agencies, government organizations, and public interest groups. Students provide substantive legal information and research (but not advice) under the supervision of practicing legal professionals. In recent years, the program has also expanded its placements to include the Saskatoon Free Legal Clinic, courtworker programs, and a host of other projects that are geared to individuals accessing justice.

Campus Legal Services is a student-run volunteer service offering legal information for students attending the University of Saskatchewan or SIAST in Saskatoon.

There are also a handful of publicly-funded and community programs that provide assistance to individuals, if not direct legal assistance. The following list is not exhaustive:

- Aboriginal Courtworker Program
- Children's Advocate Office
- Consumer Protection Branch
- Elizabeth Fry Courtworker Program
- Equal Justice For All
- Family Law Information Centre
- Federation of Saskatchewan Indian Nations, Justice Division
- Office of the Rentalsman
- Office of the Worker's Advocate
- Provincial Mediation Board

Provincial Ombudsman  
Public Legal Education Association (PLEA)  
Renter's Rights  
Saskatchewan Human Rights Commission  
Unemployed Workers Centre  
Victim's Services (Justice)  
Voice of the Blue Rose Advocacy

### **PART III**

#### **NECESSARY SERVICES FOR THOSE WHO REMAIN UNREPRESENTED**

While the last section considered options to reduce the number of unrepresented individuals, this section considers the following question: to the extent that unrepresented litigants will continue to appear on court matters, what assistance can be provided to them to make the system work better?

A number of studies and papers have been prepared which provide detailed information on the types of projects which have been implemented to address the issue of unrepresented litigants across Canada. Some of the more relevant documents are described below.

British Columbia has done extensive work in this area, which is contained on the B.C. Justice Review Task Force website, located at <http://www.bjjusticereview.org>, which contains among other papers, an inventory of family justice services in B.C., as well as a paper titled, "A Compendium of Potential Justice System Reforms", and a comprehensive study titled, "Developing Models for Coordinated Services for Self-Representing Litigants – Mapping Services, Gaps, Issues and Needs".

Nova Scotia has developed considerable resources to assist unrepresented individuals which are contained on their website at [http://www.courts.ns.ca/self\\_rep/self\\_rep.htm](http://www.courts.ns.ca/self_rep/self_rep.htm).

Some work in the area of access to justice has already been done in Saskatchewan. In 2001, the Access to Justice Committee of the Law Society of Saskatchewan requested that a research paper be prepared on the following issues:

- an examination and listing of present services and programs available for assisting people to gain access to justice in Saskatchewan;
- an examination of various initiatives in place in other jurisdictions designed to remedy difficulties with access;
- an outline of the current issues and identification of the most pressing needs in Saskatchewan;
- suggestion of initiatives which could be undertaken in the Province without (at least in the beginning), resorting to large expenditures of money by governments or other institutions.

More recently, a national study of pro bono initiatives was completed under the direction of the Federation of Law Societies.

There is a role for government in terms of coordinating information on available services for unrepresented individuals which has not been explored. This could include a self-help centre, as well as dedicating resources for the development of self-help kits in various areas of the law.

The B.C. Supreme Court Self-Help Information Centre provides a model for the provision of information to unrepresented individuals by government. In addition to the centre, a web site is available that provides additional information for unrepresented individuals and which serves as a coordinating mechanism of existing services. The website address is: <http://www.supremecourtsselfhelp.bc.ca>.

The Final Evaluation Report of the B.C. Supreme Court Self-Help Information Centre from August of 2006 is available on-line at [http://www.lawcourtsed.ca/self\\_help\\_information\\_research/index.cfm](http://www.lawcourtsed.ca/self_help_information_research/index.cfm). It should be noted that based on the evaluation report, it appears there is a somewhat limited scope for this service, as it appears to be more of a tool for those who have relatively high education levels and as a result, are quite self-reliant.

The single largest frustration for many court users in Saskatchewan is the inability to fill out forms. In examining the utility of a self-help centre, consideration needs to be given to the degree of assistance that could be provided in filling out court forms. B.C. has developed and made available at the Law Society libraries sample court forms, which appear to be a valuable tool for unrepresented individuals.

In summary, there is a broad range of projects which have been undertaken in other Canadian jurisdictions to respond to the issue of unrepresented individuals. The types of projects which have been utilized can be divided into the following general categories:

- Information and Education at the Entry Point into the Court System;
- Self-Help Centres;
- Procedural and Precedent Self-Help Books;
- Duty Counsel;
- Court-annexed services;
- Alternative Dispute Resolution Mechanisms;
- Rule Reform and Simplification, including Expedited and Simplified Procedures;
- Fee Waivers.

